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SUPREME COURT OF THE UNITED STATES

MAY TERM, 1958

No. 1011

OLGA C. LILLIONS and CHRIST D. LILLIONS, her husband, *Petitioners,*

vs.

PUGET SOUND MUTUAL SAVINGS BANK, a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

CHRIST D. LILLIONS
L. C. BROBECK,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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No. _____

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vs.

PUGET SOUND MUTUAL SAVINGS BANK, a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioners Olga C. Lillions and Christ D. Lillions, her husband, petition this Honorable Court and pray that a Writ of *Certiorari* issue to review the judgment of the Supreme Court of the State of Washington, entered in the above entitled case on February 28, 1958, as follows:

CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The judgment of the Washington Supreme Court, sought to be reviewed herein, is printed under Appendix A p. 15 hereof, no opinion having been rendered. The judgment of the lower court, entitled "Judgment for Attorneys' Fees on Appeal" is printed under Appendix B p. 17 hereof. Same was made and entered pursuant to the said Supreme Court's decision

in the appeal of the case entitled, Puget Sound M. S. Bank vs. Olga C. Lillions, *et vir.*, reported in 314 P. (2d) 935, 50 Wn. (2d) 799, pertinent parts whereof we set out below:

> "Thereafter, plaintiff filed a petition for a writ of mandate, in this court, directing the trial court to determine and allow plaintiff an attorney's fee on appeal. A show cause order was issued, and the matter presented to a Department of this court on a motion day. The Department decided (without opinion) that a decision on the issuance of the writ should be held in abeyance until the appeal was considered on its merits.
>
> "Whether an attorney's fee shall be allowed for a mortgage foreclosure depends upon the contract between the parties. In *Miesen v. Motter*, 115 Wash. 49, 55, 196 Pac. 659 (1921), this court held that RCW 4.84.020 (then Rem. Code, Sec. 475) does not mean that an attorney's fee shall be allowed in all cases of foreclosure of mortgages, but means that in all cases of foreclosure of mortgages in which attorney's fees *are allowed* the amount shall be fixed by the court. If the contract provides an allowance for attorney's fees, then the court is authorized to fix the amount; but, if the note and mortgage do not provide for such fees, then no attorney's fee can be allowed.
>
> "By the provisions of the note and mortgage, quoted *supra*, defendants contracted to pay a reasonable sum as attorney's fees in the event it became necessary to foreclose the mortgage. An

appeal having been taken, the decree of foreclosure, entered by the trial court, is neither effective nor final until affirmed by this court.

"When a note and mortgage contain contractual provisions such as we are considering, we believe they indicate that the parties contemplated that the mortgagee would be entitled to the allowance of a reasonable attorney's fee for all legal services required to prosecute the foreclosure to its ultimate conclusion, should foreclosure be necessary. This would include the right to a fee for the defense or prosecution of an appeal to this court. Such a fee is as much a part of the obligation of the contract as any other part. *See Commercial State Bank v. Curtis*, 7 Wn. (2d) 296, 298, 109 P. (2d) 558 (1941).

"In *Franklin v. Fischer*, 34 Wn. (2d) 342, 350, 208 P. (2d) 902 (1949), the lease involved in the litigation contained a provision for the allowance of attorney's fees to the successful party for the prosecution or defense of an action for the enforcement of the lease. The court expressed an opinion that the terms of the lease did 'not contemplate an attorney's fee in other than the superior court.' We believe the case is distinguishable on its facts and not apposite or controlling in the instant case. In addition, the court pointed out:

"'Neither side has briefed or argued the question of whether this court can or should make an award of an attorney's fee for services on an appeal under such a contract provision.'

"However, it does not follow necessarily that the writ of mandate should issue. Assuming, *arguendo*, that the superior court had jurisdiction to consider the motion for the allowance of attorney's fees on appeal (a question we do not decide), we cannot say that the trial court erred when it denied the motion. *At that time*, the appeal had not been completed nor had the ultimate question of foreclosure been resolved. Had we held on appeal that plaintiff's foreclosure action was without merit, an entirely different situation would exist. Therefore, we believe that plaintiff's motion for the allowance of attorney's fee on appeal was premature, and the petition for a writ of mandamus is denied. However, in view of what we have said, plaintiff's motion for an allowance of attorney's fee on appeal should now be considered by the trial court.

"In summary, we affirm the decree from which the appeal is prosecuted; we deny the petition for writ of mandamus; we remand the case to the trial court for its determination of a reasonable attorney's fee to be allowed plaintiff on this appeal." (pp. 807-8)

The rule of the State Supreme Court for attorney's fee on appeal is set forth below:

"If no cost bill is served and filed, the clerk shall tax as costs . . . a statutory attorney fee of twenty-five dollars . . . " (Rule 55 (4) 34A Wn. (2d), Supplement, p. 23.)

JURISDICTION

Following the above decision and mandate of the

State Supreme Court, the Superior Court entertained a motion filed by Respondents herein for "attorneys' fees on appeal" in the sum of $2,252.00, to be taxed against petitioners and made a lien on their real estate under foreclosure; and, further,

> "provided, however, if there is an appeal from the order of this court fixing attorneys' fees on appeal, or if defendants make objections and further contests, then plaintiff (Puget Sound M. S. Bank) should be awarded an additional sum in an amount that will reimburse plaintiff for its costs for legal services necessary to protect its interests and rights in this foreclosure action." (Transcript, p. 5.)

The said Superior Court granted Respondent judgment for $1,500.00, but in all other respects as moved for. The Superior court heard no evidence whatever in entering said judgment. Instead, it confined its consideration of the motion on Respondent's affidavit and that of Petitioners traversing the material allegations thereof, and argument of counsel. (Transcript, pp. 1-2, 3, 13.) A review of this judgment was sought by these petitioners in the State Supreme Court upon a petition for *certiorari*, wherein the following grounds, *inter alia*, were set forth:

> "That the said additional allowance of attorney's fee to Respondent of and from Appellants in the case herein is contrary to the provisions of the promissory note and mortgage entered into between Appellants and Respondent on February 4, 1952, hence in violation of the guarantees of

Article I, Section 23, of the State Constitution and Article XIV, of Amendments to the Federal Constitution against impairment of obligations of contracts and/or deprivation of property of Appellants without due process of law.

"That the said judgment, allowing Respondent the said sum for Respondent's appearance in the Supreme Court, was arrived at by the trial court without any evidence whatsoever and upon purely hypothetical premises.

"That there is no appeal nor any plain, speedy and adequate remedy or relief from the said court's said judgment." (Transcript, pp. 2-3.)

In our briefs before the State Supreme Court, filed in support of said petition, we raised vividly the Federal constitutional questions and concluded:

"We submit that the judgment sought to be reviewed is properly reviewable by *certiorari* and that on its merits it should be reversed as impinging upon well settled constitutional rights and guarantees of these petitioners against impairment of contracts and taking their property without due process of law."

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3). The judgment of the State Supreme Court, dated February 18, 1958 (Transcript, p. 32) starts the statutory period for filing this petition. (Puget Sound P. & L. Co. v. King County, 264, U.S. 22, 23-25)

QUESTIONS PRESENTED

1. Whether the State Supreme Court erred in its refusal to review upon *certiorari* the said Superior Court's judgment for attorneys' fees, as being

A. in impairment of the obligations created by the note and mortgage, entered into between these petitioners and Respondent bank;

B. in conflict with and departure from the construction placed by the State Supreme Court "consistently" to such provisions of contracts in all its previous decisions;

C. as being illegal and unconstitutional, because of retroactive application of said new rule upon the contract of the parties herein.

D. as being unsupported by evidence, hence arbitrary and contrary to the constitutional guarantees, enumerated above, in depriving petitioners of rights and property without due process of law.

STATEMENT

In view of what has preceded herein, little, if anything, is left for inclusion under this heading without being repetitious. The motion and affidavit of Respondent couched in language reminiscent of the "sword of Damocles," so that Petitioners would not assert their legal rights, speaks for itself. We venture to say that it is unique in court proceedings.

In our briefs before the State Supreme Court, submitted herewith under separate certification, we stress the constitutional questions above anything else in the entry of this judgment by the Superior Court upon a note and mortgage, which never contemplated thousands of dollars in attorneys' fees, in the event that the mortgagors, upon feeling aggrieved by the lower court's judgment, were to appeal to the Supreme Court. Until the entry of the actual judgment for such fees by the said Superior Court there was nothing concrete to seek

a higher review of. An appeal would have been fruitless. Petitioners' choice of proceeding by *certiorari* was, we submit, the right proceeding. Anyhow, there was no right of appeal by the time this was decided. Are we to conceive that such an action of the Superior Court, as is the entering of a substantial judgment against petitioners under the circumstances in this case, is without the right of review? What if the same Court had entered a judgment for $10,000.00, for example?

REASONS FOR GRANTING THIS WRIT

The State Supreme Court will be presumed to have based its judgment denying the petition for *certiorari* "on the law raising the federal question," otherwise the U. S. Supreme Court's review would be defeated merely by raising on the record some non-federal question, however inadequate or erroneous, and then suggesting that the state court may have based its decision thereon.

Klinger v. Missouri, 13 Wall. 257, 263. *Williams v. Kaiser*, 323 U. S. 471, 478; *Maguire v. Taylor*, 8 Wall. 650, 665; *Johnson v. Risk*, 137 U. S. 300, 307; *Lawrence v. State Tax Commission*, 286 U. S. 276, 282-3; *Nielson v. Lagow*, 12 How. 98, 110.

The material allegations of our petition to the State Supreme Court must be deemed admitted by Respondent, since by its Answer to Relator's Petition Respondent confines itself to pleading that the matter became moot, because an unsuspecting clerk of the Superior Court was superinduced to divert funds, paid by these petitioners on the 10% interest-bearing decree of fore-

closure following its affirmance, to the judgment for appeal fees entered over a month later by the same Court. This, and Respondent's statement under Par. III (Transcript, p. 18) that

> "An appeal lies from the judgment fixing attorneys' fees on appeal. Time for appeal has expired . . . "

constituted its main objections to the granting of a writ of *certiorari* by the said Supreme Court. The further statement of Respondent under said paragraph, that "Relator offered no evidence," would imply that it was up to petitioners to introduce evidence in order to disprove that $2,252.00, assessed without evidence, plus additional *in futuro*, were not reasonable!

With the exception of ground marked *D* in "Questions Presented," the other three grounds may be discussed together, to avoid repetition.

The lease in *Franklin v. Fischer*, 34 Wn. (2d) 342, 350, 208 P (2d) 902 provides:

> "In any action between the parties hereto, their successors or assigns, for a breach or for the enforcement of any of the terms or conditions of this Lease, a reasonable attorney's fee, to be fixed by the court, shall be added to and be made a part of the recoverable cost in such action, in favor of the successful party."

The note and mortgage in our case provides:

> "If this note is placed in the hands of an attorney for collection after any default, I promise to pay a reasonable sum as an attorney's fee, in addition to all costs and expenses of such suit and preparing therefor.

> "The mortgagors shall pay the mortgagee a reasonable sum as attorneys' fees in any suit which the mortgagee defends or prosecutes to protect the lien hereof or to foreclose this mortgage; . . . "

Did the Supreme Court merely "express an opinion," *obiter* so to speak, in ruling that Respondent's demand in that case for an attorney's fee of $750.00 should be turned down? We set out the court's statement:

> "The right to other than the statutory attorney's fee rests upon the provision in the contract of the parties last quoted, which we believe does not contemplate an attorney's fee in other than the superior court. Neither side has briefed or argued the question of whether this court can or should make an award of an attorney's fee for services on an appeal under such a contract provision. It will be noted, however, that in construing Rem. Rev. Stat., Sec. 1157a (P.P.C. Sec. 172-11), which provides that in certain types of lien foreclosures, ' . . . The court may allow . . . a reasonable attorney's fee in the action," and Rem. Rev. Stat., Sec. 1141 (P.P.C. Sec. 180-25), which provides that ' . . . The court may allow . . . a reasonable attorney's fee in the superior and supreme courts,' we *have consistently refused* to make any allowance of attorneys' fees in addition to that made by the superior court. *Standard Lbr. Co. v. Fields*, 29 Wn. (2d) 327, 354, 187 P. (2d) 283. See *Flint v. Bronson*, 197 Wash. 686, 692, 86 P. (2d) 218, where our cases on this point are reviewed." Emphasis by Petitioners. *Franklin v. Fischer*, 208 P. (2d) on p. 906.

The State Supreme court's decision, we submit, is a reversal, a clear departure from its construction of said provisions in notes, mortgages, leases etc., all standard for that matter.

We submit that such a departure is not warranted by the terms of the provisions of our contract. In any event, however, a reversal of the said court's position cannot operate retroactively upon these petitioners by the entry of the said judgment and perhaps others to follow. As said by the same court in *Powell v. Pugh*, 13 Wash. 577, 43 Pac. 879

> "The rule announced by a divided court in the *Powell* case does not affect titles to real property, nor does it create any *vested property right* in the husband's creditors as such to the community personalty. To overrule that decision and the two which follow it cannot affect rights which have become vested by antecedent sales of such property on execution for the husband's separate debts. *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358, 19 L.R.A. 379; *Harris v. Jex*, 55 N.Y. 421, 14 Am. Rep. 285; *Kelley v. Rhoades*, 7 Wyo. 237, 57 Pac. 593, 75 Am. St. 904, 39 L.R.A. 594; 7 R.C.L. p. 1010. Sec. 36. It can affect no rule of property, since the husband will still have every right of management, control, and voluntary disposition of the community personalty that he ever had, whatever those rights may be—a thing which it is unnecessary now to decide. It certainly cannot affect injuriously either the husband, the wife, the community which they compose, nor any vested property rights of third parties." *Schramm v. Steele*, *supra*, pp. 317-318.

The case of *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358, 19 L.R.A. 379, appears to have pioneered the foregoing rule and we quote from it the following:

> "The construction now placed upon this statute should now be deemed correct, but as to the wisdom of overruling a line of decisions which had been steadily adhered to for the period of 23 years we

have nothing to say, further than to remark that stability in the decisions of a court of last resort is greatly to be desired. To overrule precedents which have become recognized rules of property, and the basis of contract relations, unsettles titles, disturbs business transactions, and introduces an element of uncertainty into the administration of justice from which the public suffer great inconvenience. As was said in the case of *Rockhill v. Nelson, supra*: 'There are some questions of law the final settlement of which is vastly more important than how they are settled.' We fully indorse the language of the world's greatest commentator when he says: 'It is an established rule to abide by former precedents where the same points come again in litigation; as well to keep the scales of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from laws and customs of the land; not delegated to pronounce new law, but to maintain and expound the old one."

See also *Page On The Law Of Contracts*, Volume 4, Section 2048, page 3544; and

1919-1929 *Supplement of Page on Contracts*, Section 2048, page 1400, wherein it is said:

> "Valid laws which are in force when the contract is made are said to be a part thereof, even though not expressly referred to, as fully as if incorporated therein. The workmen's compensation act, *as construed*, is a part of a contract of employment."

As authority for this statement of the law the author gives the case of *Reutenik v. Gibson Packing Co.*, 132

Wash. 108, 231 Pac. 773, holding as follows:

> "The construction of the workmen's compensation law by the courts of last resort of California also is a part of the law of the contract, and therefore a part of the contract."

In the *Haskett* case, above, the Indiana Supreme Court cites, among other decisions of the U. S. Supreme Court, the case of *Douglas v. County of Pike*, 101 U.S. 677, wherein it is said *apropos* of the question:

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. Suth. St. Const. Sec. 319, says: 'A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of these rights. To divest them by a change of construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded, so as to affect the obligations of existing contracts, made on the faith of the earlier adjudications.'"

Due Process of Law

We quote the following from Chief Justice Taft's opinion in *Truax v. Carrigan*, 257 U.S. 312, 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily, or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his

> life, liberty, property and immunities under the protection of the general rules which govern society."

In *Mass. Bonding and Ins. Co. v. Johnston & Herder*, 22 A.(2d) 709, 713, 343 Pa. 270, the Supreme court of Pennsylvania states:

> "The 'further proceedings' for which we remitted the record to the court below in our order of November 25, 1940, were intended to be proceedings in accordance with our opinion and in accordance with Equity Rule 71 whose mandate, we said, 'is unambiguous and must be complied with.' We add that all the other applicable equitable equity rules must be complied with and both parties must have their 'day in court' in accordance with the elementary requirements of 'due process.'"

CONCLUSION

For the foregoing reasons, we submit that this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

CHRIST D. LILLIONS

L. C. BRODBECK,

Counsel for Petitioners.

DATED May 12, 1958.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Tuesday, February 18, 1958

PUGET SOUND MUTUAL SAVINGS BANK, a corporation, *Plaintiff*,
vs.
OLGA C. LILLIONS and CHRIST D. LILLIONS, her husband,
Defendants and Relators,
THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, HON. STORY BIRDSEYE, JUDGE,
Respondent.

JUDGMENT
No. 34553

This cause having been heretofore submitted to the Court upon the petition of the relator for the issuance of a writ of Review reversing respondent Court's judgment of December 6, 1957, and praying that the same be vacated and held for naught, or such other relief, and that respondent be enjoined from proceeding under said order and/or for further relief in that certain cause in which Puget Sound Mutual Savings Bank, a corporation, is plaintiff and Olga C. Lillions and Christ D. Lillions, her husband, are defendants in the records of the Superior Court of the State of Washington in and for King County being cause No. 476216 of said Court, and the Court having fully considered the same and filed its order in writing, denying the writ, and on motion of Kumm, Maxwell and Lee, of counsel for respondent.

IT IS ORDERED, Adjudged and Decreed, that the writ of review be and the same is denied, and that the said Puget Sound Mutual Savings Bank, a corporation, have and recover of and from the said Olga C. Lillions and

Christ D. Lillions, her husband, the costs of this action taxed and allowed at Twenty-six and no/100 Dollars ($26.00), and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Journal 42 at page 422
Office of the Clerk of the
Supreme Court

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PUGET SOUND MUTUAL SAVINGS BANK, a corporation,
Plaintiff,
vs.
OLGA C. LILLIONS and CHRIST D. LILLIONS, her husband,
Defendants.

No. 476216
Judgment for Attorneys' Fees on Appeal

THIS MATTER having come on before the Honorable Story Birdseye, one of the judges of the above-entitled court, on November 22, 1957, upon plaintiff's motion for an allowance of attorneys' fees on appeal, and the judgment on remittitur of the Supreme Court of the State of Washington having been filed, and the defendants' motion to recall the remittitur having been denied by the Supreme Court, and said judgment having directed this court to fix and allow to plaintiff a reasonable sum as attorneys' fees in answering and defending against the appeal prosecuted by defendants, and the Court having read and considered plaintiff's motion for an allowance of attorneys' fees on appeal, and the affidavit in support thereof, and having considered the files and records herein, and having heard from both Mr. Maxwell and Mr. Lillions, and the Court, after careful consideration, finding that $1500.00 is a reasonable sum to allow plaintiff as attorneys' fees for legal services rendered by plaintiff's attorneys in connection with the appeal taken by the defendants to the Supreme Court, to-wit: for services from the date of the entry of the decree of foreclosure, April 4, 1956, through the date

hereof, and that judgment should be entered for said sum, together with interest thereon at the rate of 6% per annum from and after the date hereof, and that the amount herein fixed and allowed as attorneys' fees on appeal should be in addition to the amount of the judgment entered against said defendants by the decree of foreclosure entered on the 4th day of April, 1956, and should be made a lien upon the mortgaged premises as fully and to the same extent as though said attorneys' fees on appeal had been fixed and made a part of the said decree of foreclosure heretofore entered herein, and the Court being advised in the premises; now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover from the defendants, OLGA C. LILLIONS and CHRIST D. LILLIONS, her husband, and each of them, and the marital community composed of them, judgment in the amount of $1500.00, together with interest thereon from the date hereof at the rate of 6% per annum, and that said amount be and is in addition to the amount of the judgment rendered against said defendants by the decree of foreclosure made and entered on the 4th day of April, 1956, and is decreed to be a lien upon the mortgaged premises therein described.

IT IS FURTHER ORDERED that the clerk of the above-entitled court be and is hereby directed to include the above amount, together with interest thereon, as attorneys' fees herein, in the order of sale directed to the sheriff.

DONE IN OPEN COURT this 6th day of December, 1957.

STORY BIRDSEYE
Judge

Presented by
R. W. MAXWELL
Of KUMM, MAXWELL & LEE
Attorneys for Plaintiff

APPENDIX C.

Notice of Appeal and Cross-Appeal in Civil Cases

(1) Notice of appeal shall be given from an appealable order, judgment, or decree in a civil action in the following manner:

(a) *From Final Orders, Judgments, and Decrees.* By filing with the clerk of the superior court written notice of appeal within thirty days after the day of entry of a final order, judgment, or decree. Rule 33, Wn. 34A (2d) Sup. p. 12.